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No. 86-1503

In The

SUPREME COURT OF THE UNITED STATES
March Term, 1987

Marco Samayoa, et al.,
Petitioners

-v.-

CHICAGO BOARD OF EDUCATION., et al.,
Respondents

APPELLANTS' RESPONSE ON THE ISSUE OF MOOTNESS

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APPELLANTS' RESPONSE ON THE ISSUE OF MOOTNESS

On January 22, 1988, this court directed Plaintiffs to discuss the issue of mootness under Art. III, Section 2 of the United States Constitution. Plaintiffs present the following discussion:

I. Plaintiffs Can And Should Be Reinstated To Walt Disney Magnet School.

> "Any person turned away by the government on account of his race is entitled to a respectful hearing by a court, a hearing at which the government must supply a powerful justification. Chicago has not offered a justification, and the plaintiffs in this case have not received their due from this court." Dissent to the petition for rehearing en banc (App. B, of the Petition for a Writ of Certiorari).

The exclusion of the Children-Plaintiffs is still in effect. The children have not been reinstated and there is no allegation by the Defendants that the Desegregation Plan is no longer in effect. There is no voluntary cessation of the exclusion or transfer practices that are the subject of this litigation.

None of the excluded students have yet graduated and all stand ready to go back to Disney.

All the Plaintiffs are perfectly capable of entering the school if reinstated. None of them have moved out of the area, and all of them are in contact with counsel for the Plaintiffs. The 3 and 4 year old children who are now 9 and 10 will enter the 4th and 5th grade and will receive the benefit of the remaining 3 or 4 years of enriched education which Walt Disney Magnet School can provide and for which they were accepted in the first place.

The present effect of the exclusion by the implementation of the Desegregation Plan has not been arrested by any events, as evidenced by the fact that children remain excluded. There is no change of applicable law. The implementation of the Desegregation Plan continues to transfer and to exclude Plaintiffs and many other children every year. The yearly modifications of the consent decree and the continued use of certain impermissible racial quotas continues to have an

impact on the parties such that the case remains alive and is not moot.

II. The Case Is Not Moot Because Plaintiffs' Have A Personal Stake In The Outcome Of The Controversy.

There is a full record of the facts of the dispute. The proceeding is clearly adversarial and Plaintiffs have standing and an opposing personal interest to Defendants. Defendants have not ceased the challenged implementation of the Desegregation Plan thus arresting the present effect on Plaintiffs and eliminating the risk of recurrence. The Plaintiffs could even bring their suit now since the principle contended for is still being violated and the children remain excluded. Plaintiffs have a continuing interest. Since there is adverse interest which can be remedied by reinstatement,

an effective remedy can be imposed by this court.

III. The Supreme Court Can Carry Out An Effective Remedy.

This court can order both prospective relief such as an injunction and mandamus, and retrospective relief such as damages which are claimed by Plaintiffs.

The effect of the court remedy will be felt on Plaintiffs and on other litigants and in other situations upon persons similarly situated who are denied admission. Such remedy will affect not just possible future adverse effects but in fact actual continuing adverse effects upon Plaintiffs.

IV. Plaintiffs' Seek Both Injunction And Damages Resulting In A Justiciable Issue That Is Not Moot.

The Plaintiffs do not only seek an injunction, but seek the awarding of actual and punitive damages and attorney's fees against Defendants under 42 USC Sec. 1983 (as is the case since they went to private pre-kindergarten schools not available in Chicago and had to assume additional tuition, transportation and pre-enrollment medical and other expenses) which results in a justiciable issue that is not rendered moot. See DeFunis v. Odegaard, 416 U.S. 312.

Whether we assume arguendo either that Plaintiffs have been reinstated or that they are no longer available for reinstatement, Plaintiffs have not been made whole since they paid out monies which they would not have

disbursed had they been admitted originally. In addition they have been deprived of the first 7 years of a unique and enriched education at one of the best elementary schools in the city. In addition, the 5 and 6 year old children who were readmitted as a result of this lawsuit have not yet been made whole; their claim for monetary damages has not yet been honored.

The complaint unambiguously requests damages. See opinion of the Seventh Circuit Court of Appeals, 789 F. 2nd 1046, (Appendix A, Petition for a Writ of Certiorari). The amount of money at stake does not determine the mootness and as long as Plaintiffs have a concrete interest in the outcome of the litigation the case is not moot. Firefighters v. Stotts, 467 U.S. 561 at 571. If the case were moot and the judgment of the Court of Appeals is not reversed, the exclusions would be lawful, and the Defendants would not pay out any

money to which the Plaintiffs had no legal right.

V. The Case Is Not Moot Because Plaintiffs Ask For Declaratory Judgment Based On An Actual Controversy.

Plaintiffs have asked for declaratory relief, which depends on the existence of an "actual controversy". Thus the interests of the parties should be scrutinized.

The denial of due process and equal protection of the laws that started with the exclusion of Plaintiffs from the school is still present. The standard of Strict Judicial scrutiny was never applied and in questions of race the manner in which the government applies the law is of great concern.

Neither the District, the Appellate nor the Supreme Court have ruled on one of the most

important and crucial principles advanced by Plaintiffs: that preferential forms of affirmative action are constitutional if (1) said preferences have a compelling governmental purpose, (2) they are relevant and necessary to the achievement of said governmental purpose, and (3) they do not create unacceptable hardships and suffering on identifiable individuals.

The principle contended for by Plaintiffs that Defendants have no power to exclude without a compelling justification has a present and future adverse effect on Plaintiffs.

The court must resolve such a corrosive legal situation by means of effective relief which "declares the rights and other legal relations" of the parties.

Without a declaratory judgment, the possibility of adverse governmental action in excluding the children keeps the controversy

alive, and hence, keeps the case justiciable especially where the fundamental freedom of choice is suppressed. A determination by this court of the legal issues tendered is necessary to compel the readmission of the children to the school and to prevent the chilling effect on the parents who may be discouraged from trying to exercise their protected freedom.

VI. The Dispute Is "Capable Of Repetition, Yet Evading Review."

The possibility of future recurrence of the dispute is always present since there are no changes that affect the past, present and future adverse effects on the Plaintiffs and nothing prevents the continued recurrence of the dispute. An obvious example of this is Johnson I, and Johnson II (See Petition for a Writ of Certiorari at page A26) which are repetitive

appeals to the Supreme Court. In all cases the same defendant is a recurring litigant as in our case.

Since the minor children have not outgrown the possibility of reinstatement, the future effect is not speculative and the "mere possibility [of recurrent violation] . . . serves to keep the case alive." U.S. v. W.T. Grant Co., 345 U.S. 629 at 633. Furthermore, the certainty of the possibility of the recurrence of the dispute will bring the same two parties before the court.

There is a substantial likelihood that the issues will always return to the court in the same condition because of the inherent nature of the issue, since in other cases the children do not start at the early ages of 3 or 4 as they do in this case.

This kind of case such as the Bakke, DeFunis and Johnson case appear to be inherently

evasive of review. They take a very long time to resolve. They are the type of disputes which have come to be known as "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498. Because the children started very early in the Disney case, they have not yet outgrown the case and their continuing exclusion is not just a possibility but is in effect a certainty. When this is coupled with the public importance of the ruling on the issue of affirmative action in public schools it is clear that Plaintiffs have a sufficient interest in the litigation and that the case is not moot. Such an application is not an expansion of the scope of Southern Pacific Terminal Co. v. ICC, cited above; rather, it is an additional assurance that preserves the quality of judicial review and fulfills its purpose. The need for its resolution reflects a continuing controversy

in the federal-state area. Moore v. Ogilvie, 394 U.S. 814 at 816.

VII. The Case Presents A Federal Constitutional Issue Of Great Public Importance Presented In An Adversarial Setting.

In general the potential challengers of the unlawful exclusions are not a cohesive group, and individual persons are not in a position to resist the underlying question of unconstitutional exclusion. See the cases dealing in the area of welfare law where defendants usually attempt to defeat review by granting the benefit when faced with a suit. See Jackson v. Department of Public Welfare, 2 CCH Pov. L. Rep. Par. 10,170. An effective remedy should provide for all people against repetitions of unconstitutional conduct at a level where most people are unable to finance a

protracted litigation.

The Supreme Court has asserted the relevance of public interest in the mootness determination. See, e.g., U.S. v. W.T. Grant Co., 345 U.S. 629. Avoidance of repetitious litigation serves the public interest. Said repetitious litigation provides the evidence of the subsistent existing controversies that will not disappear and underscores the very important constitutional questions presented, see DeFunis v. Odegaard, Id. at 350, particularly where the stakes of the litigating parties assure the adversarial quality of the litigation and preclude the frustration of the last avenue of judicial review.

CONCLUSION

Petitioners submit that for the aforesaid reasons the Walt Disney Magnet School case is not Moot and further that the court should decide the case on its merits and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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